United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1437

To be argued by
CLARK J. GURNEY

United States Court of Appeals

For the Second Circuit

B/S

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,
Plaintiffs-Appellees,

against

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,
Defendants-Appellants.

On Appeal from a Judgment and Order of the United States District Court for the Southern District of New York

(72 Civ. 1901)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Plaintiffs-appellees ("plaintiffs") have failed to address themselves to most of defendants-appellants' ("defendants") arguments and authorities, or even attempt to justify the standard utilized by the Court below as the basis for striking defendants' answer. Indeed, in large measure, their brief is an attempt to somehow expand the factual predicate for the decision by resorting to a detailed rehash in grab bag fashion of the year-long "tug of war" concerning their one hundred thirty interrogatories. When plaintiffs do come to grips with some of the matters raised

in defendants' brief, their arguments are often based on assertions that have no record references and, indeed, assertions that are actually contradicted by the record.

1. In an effort to obscure the fact that defendants were not represented by counsel when plaintiffs' motion to strike was granted, the following is asserted on page 7 of plaintiffs' brief:

> "The defendants' answer was stricken by order dated August 22, 1973 (19a). Defendants' motion to vacate that order was denied (14a). *Thereafter,* defendants' counsel became disgusted with his client's behavior and withdrew from the case with the permission of the court (144a, 146a)."

The record reveals, of course, that the motion to withdraw was made and granted long *before* defendants' answer was stricken (153a). In fact, counsel unilaterally "withdrew from the case" on June 7, 1973 (182a), *before* the motion to strike was noticed on June 14, 1973.

2. Continuing in this vein, there appears this highly misleading statement:

> "Koegel did nothing when a copy of the proposed order for dismissal of his answer was served upon him on August 17, 1973; he waited till judgment was about to be entered" (p. 38).

Assuming a copy of the proposed order was served upon Mr. Koegel [no such document with proof of service was filed in the District Court (iiia)], what could Mr. Koegel have done? He was without counsel and actively seeking to engage one (96a); he was also without his files,

since his prior lawyers were asserting an attorney's lien thereon (91a). In the absence of a lawyer and the files, even if Mr. Koegel were served with that proposed order, it would appear to make little difference.

3. On page 19, plaintiffs assert that:

> "Judge Lasker rendered a decision striking defendants' answer basing it on all the proceedings in the case (18a)."

Judge Lasker's decision (18a) will be read in vain for such a statement.*

4. Plaintiffs sprinkle references throughout their brief to "hearings" that were held concerning the interrogatories, presumably in an effort to undercut the fact that no testimonial hearing was held on the disputed issues of fact presented by the affidavits on the motion under Rule 60(b).** Indeed, plaintiffs' references to "hearings" turn out often not to be hearings at all, but merely informal conferences in Judge Lasker's chambers. For example, on page 18, plaintiffs assert:

> "Judge Lasker held a hearing on June 27, 1973, at which Mr. Olick† and counsel for plaintiffs were present (85a)."

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* It would have been improper for the District Court to base its decision on prior discovery proceedings which culminated in defendants' compliance, since the purpose of Rule 37, as discussed at pp. 24 and 25 of our main brief, is to "compel compliance" with outstanding discovery obligations, and "not to punish erring parties." *Robison* v. *Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966).

** Even plaintiffs concede that if wilfulness is required under Rule 37 when an answer is struck, "then a hearing possibly would have been advantageous" (p. 38).

† Mr. Olick's firm had, of course, previously moved to be relieved as counsel.

However, a reading of Judge Lasker's letter (85a) shows that the so-called "hearing" was in fact a "discussion."

5. Arguing that it was entirely within the District Court's discretion to decide whether an oral hearing was needed concerning the disputed issues of fact, plaintiffs assert that:

> "Judge Lasker specifically directed Mr. Koegel to submit any additional information which he wanted to call to Judge Lasker's attention in affidavit form by July 20, 1973 (86a)" (p. 37).

However, the direction referred to by the District Court had nothing to do with the motion to strike, but rather counsel's motion to withdraw (86a, par. 2).*

6. Plaintiffs assert (B. 10) that David I. Koegel Enterprises, Inc. "refused" to submit to oral examination and that, as a result, they

> ". . . were compelled to make a second motion under Rule 37."

However, as will be recalled from our main brief, there was no "refusal" to appear, but rather an adjournment requested by Mr. Koegel's attorneys in writing (p. 16).

Nor was the motion based on any such alleged "refusal," but was entitled "Motion to Vacate Answer for Failure to Respond to Interrogatories" (154a).

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* Of course, our contention (main brief, pp. 34-40) is that the evidentiary hearing was required on the Rule 60(b) motion, where the facts were in dispute.

7. It is asserted on page 22 that:

> "Magistrate Goettel found as a fact (177a) that Exhibit 'A' [to Supplemental Answers No. 2] was a fabricated exhibit, manufactured by deleting the name of a payee from another debenture."

No such finding was made, and Magistrate Goettel wrote as follows:

> "The document supplied is a *blank form* with the name of a payee eliminated and is obviously not a proper response to the interrogatory."

8. On page 39, plaintiffs misleadingly imply that defendants have been represented in this action by four law firms since their initial attorneys withdrew. However, Marcus & Angel were retained in connection with the supplementary proceedings in the District Court to enforce the judgment herein, and this firm was retained only for the instant appeal.

9. Plaintiffs assert on page 41 that "numerous material interrogatories remain unanswered." Suffice it to say that after plaintiffs' motion was resolved, defendants were ordered to answer four interrogatories, and only four (153a).

The Claim that Mr. Koegel Lied

In addition to the foregoing, plaintiffs have made several assertions that Mr. Koegel on various occasions lied to the Court below. An examination of the record indicates that these assertions are also unfounded.

1. *There was no contradictory response to Interrogatory No. 20, and plaintiffs' characterization of the questions and answers is false and misleading.*

On pages 21 and 22 of their brief, it is asserted that Mr. Koegel "lied," claiming that two different answers were given to the same question. However, there were two separate questions Nos. 19 and two separate questions Nos. 20, addressed, respectively, to Flora Mir Candy Corporation and David I. Koegel (R. 16, Answers to Interrogatories, at p. 16). One question inquired as to whether there

> "were debentures of Flora Mir issued to David I. Koegel Enterprises, Inc."

Another question bearing the same number, but directed to Flora Mir Candy Corporation, inquired

> "was Flora Mir *at any time* indebted to David I. Koegel Enterprises, Inc."

Both questions were answered affirmatively, indicating that there was a debenture in the amount of $192,500 outstanding and also notes which totalled $192,500 which, apparently, had been converted into the debenture.

Question No. 38, the answer to which plaintiffs further assert contradicted the answer concerning the notes, asked whether

> "David I. Koegel Enterprises *hold*[*s*] promissory note or notes . . ." (R. 16, Answers to Interrogatories, at p. 22).

The answer was that there are no notes, since that indebtedness is not *presently* outstanding, but, as noted above, was converted into the debenture.

Thus, defendants' answers were not contradictory, but rather were accurate responses to plaintiffs' confusing in-

terrogatories, one of which, No. 19, used the words "at any time," whereas Interrogatory No. 38 spoke of the present time.

2. Another misleading statement is contained on page 23 under the caption "Koegel made misstatements of fact to the District Court" (p. 23). In this section plaintiffs juxtapose two perfectly consistent and unrelated statements and then conclude that one must be a lie. However, the four interrogatories, the information concerning which Mr. Koegel swears was provided to his former attorneys, are of course Nos. 20, 38, 45 and 66—none of which are therefore related to the assertions made concerning the interrogatories set forth on page 24 of plaintiffs' brief.

3. We do not understand the references under Item 3 of plaintiffs' brief (p. 24), except that we have discussed (b) (120a) above at pp. 5 to 7. It is noted that although plaintiffs moved to strike certain portions of our main brief which dealt with matters in the Chapter XI proceedings, plaintiffs have no trouble referring to the Petition therein, which is also not part of the record on appeal.

4. We have treated of the document question in our main brief, including Mr. Koegel's sworn statement that all his files and the corporate files were made available or turned over to his initial attorneys (140-141a). Indeed, even his former attorneys conceded that

> ". . . Mr. Koegel tried in good faith to furnish the requisite information. However, his files are in such disarray and he has been involved in so many complicated transactions that it was difficult, if not impos-

sible, for him to fully satisfy the plaintiffs' attorneys . . . Deponent confirms that Mr. Koegel, albeit under great pressure from deponent's office, furnished many documents and much information as attested by the volumes of material contained in the answers to the voluminous interrogatories propounded by the plaintiffs'' (141a).

A Word About Plaintiffs' Claim

In an apparent effort to justify the voluminous nature and questionable relevance of their interrogatories, plaintiffs set forth numerous alleged misrepresentations on pages 3 through 6 of their brief. However, the Purchase Agreement (191a) will be read in vain to find but three of those representations.* As to the three (see (c), (d) and (g), p. 4), the Purchase Agreement provided that the plaintiffs had "fifteen (15) days after the receipt of the audited statement" to rescind the transaction (200a). There apparently is no dispute that they received the audited statement and elected not to rescind.

If anything, plaintiffs' recital of the issues involved in this case, coupled with defendants' *prima facie* meritorious defenses, bolsters defendants' contentions concerning the impropriety of the lower court's decision to strike defendants' answers and deprive them of their property without any hearing on the merits.

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* It will be recalled that the plaintiffs, who were represented by counsel, affirmed in the Agreement that they did not rely "on any information, representation or other statement *not* contained in [the] Purchase Agreement or in the Debentures . . ."

POINT I

Plaintiffs' authorities affirm the proposition that before the sanction of striking an answer can be imposed under Rule 37, the court must find both a wilful disobedience of a court order and a high degree of materiality of the information sought to the truth of the claim or defense.

As noted in defendants' main brief, the 1970 Amendments to Rule 37(d) did not delete the wilfulness requirement when a serious sanction is to be imposed. On the contrary, if anything, the Amendments were an attempt to lessen the use of such a sanction except in the severest of cases where wilfulness is almost a foregone conclusion. As the Advisory Committee notes indicate, the Rule was amended to permit the imposition of less severe sanctions which will obtain compliance by recalcitrant defendants. When such lesser sanctions fail, i.e., when it is irrefutably obvious that a party will *refuse* to comply absent the severest sanctions, only then should such sanctions be imposed. See, Advisory Committee Notes of 1970 to Amended Rule 37; 4A Moore, *Federal Practice,* Paragraph 37.05, pp. 37-95, n. 14 (1974).

Again, as noted in our main brief, the constitutional mandates of *Societe Internationale, etc.* v. *Rogers,* 357 U.S. 197 (1958) require the element of wilfulness before a default judgment can be entered. This same constitutional limitation requires that the information sought be relevant to the merits of the action. See *Hammond Packing Co.* v. *State of Arkansas,* 212 U.S. 322 (1908); *Hovey* v. *Elliott,* 167 U.S. 409 (1897).

The cases cited by plaintiff fully support the above analysis of Rule 37(d). Indeed, in each and every case, with the exception of *United States* v. *Continental Casualty Co.*, 303 F. 2d 91 (4th Cir. 1962),* the finding of wilfulness was predicated upon disobedience of not one but several court orders. Furthermore, in every case, relevance was found or implied by the court.

In *Norman* v. *Young*, 422 F.2d 470 (10th Cir. 1970), the court, before entering a default judgment, specifically found that not only were the documents sought in defendants' possession and control, they were very relevant to the case and were not produced in spite of two court orders. The court, noting the constitutional limitations of *Rogers*, found that the sanction of a default judgment was not a punishment there, since defendant wilfully (i.e., "more than intended" (*id.* at 474)) refused to produce the requested documents which, in turn, gave rise to the presumption that his defenses were without merit. The court also noted that no alternative, less drastic remedy would have secured compliance.

In *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F. 2d 257 (9th Cir. 1964), the court, in granting a default judgment for repeated failures to appear at depositions, specifically found wilfulness and moreover defined it in the most narrow of terms requiring that the conduct be "not merely intentional; it [must be] a direct flaunting of

* In *Continental Casualty*, a default judgment was entered for failure to timely answer interrogatories. The Court of Appeals affirmed the default judgment upon the express ground that the answers to the interrogatories (which were served on the eve of the default judgment but were nonetheless untimely) admitted more than half of the plaintiff's claims, and, based on other similar lawsuits against defendant, its defenses were without merit.

the authority of the court'' (*id.* at 269). Cf. *Transworld Airlines, Inc.* v. *Hughes,* 332 F.2d 602 (2nd Cir. 1964). Defendant, in *Pioche,* had deliberately refused to obey court orders or even to appear at a hearing when specifically requested to do so by the court. Even with such flagrant conduct, the court was concerned with the constitutional overtones of its decision. Indeed, it is stated

> ''We agree that a party should be deprived of his day in court only upon a strong showing of willful disobedience of court process.'' (*id.* at 270).

The court went on to emphasize that, in the present case, wilfulness was ''not only well supported, but virtually inescapable.'' (*id.*)

Unlike *Pioche,* in the instant case there was absolutely no showing (and no finding) of wilfulness, let alone the ''strong showing'' some courts have required. Rather, as our main brief demonstrates, any failures by defendants to respond to discovery demands were due to circumstances beyond defendants' control or resulted from the breakdown in the relationship between defendant Koegel and his counsel. See also *Jones* v. *Uris Sales Corp.,* 373 F.2d 644 (2nd Cir. 1967), *Michigan Window Cleaning Co.* v. *Martino,* 173 F.2d 466 (6th Cir. 1949) and *Diaz* v. *Southern Drilling Corp.,* 427 F. 2d 1118 (5th Cir. 1970) where failures to appear at depositions, produce documents or answer interrogatories resulted in wilful violations of court orders and deprived the opposing parties of relevant and essential information.

Thus, plaintiffs' authorities support defendants' contention that the District Court erred in striking defendants' answer by applying a ''good-faith'' standard and not making a finding of high relevance.

POINT II

The fact that prior hearings were held before the Magistrate concerning interrogatories was, of course, no substitute for a testimonial hearing concerning the disputed issues of fact raised by the affidavits on defendants' Rule 60(b) motion.

Plaintiffs apparently concede that, if Rule 37 requires a showing of wilfulness, a hearing should have been held "to observe the demeanor of the defendant and to determine whether his default has been willful or not" (Brief, p. 38). However, plaintiffs maintain that because there were several discovery hearings before two magistrates, defendants cannot complain. Such assertion, of course, completely ignores the point.

While the various prior hearings dealt with specific issues which arose during the discovery process in this case, none of such hearings dealt with the issues raised in connection with the orders striking defendants' answer and denying their motion to vacate under Rule 60(b), namely, defendants' wilfulness and the degree of relevance of the information sought. As noted in Point I, these two issues are key to any decision to impose a sanction under Rule 37 striking a pleading. Also, as noted, several contested questions of fact existed in connection with such issues, questions of fact which could not, and should not, have been decided against defendants by choosing one piece of paper over the other and without benefit or oral testimony and cross-examination. See *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th

Cir. 1970); *Federal Deposit Ins. Corp.* v. *Alker*, 234 F.2d 113, 117 (3d Cir. 1956); see also, *Dopp* v. *Franklin Nat'l Bank*, 461 F.2d 873, 879 (2nd Cir. 1972).

Specifically, the moving affidavit on defendants' motion under Rule 60(b) made a *prima facie* showing that there had been no wilfulness in connection with the matters outlined in the District Court's decisions. Firstly, Mr. Koegel swore that he was never served with the Order of June 21, 1973.* Secondly, Mr. Koegel further swore that he did not attend the deposition scheduled for June 7 because he was told by his withdrawing counsel that his attendance would not be necessary (104a). Thirdly, Mr. Koegel swore that he had delivered to his attorneys or made available to them all books, records and papers in his possession in connection with the interrogatories and that it was counsel's failure, and not his, that led to deficient answers (98a, 100a). Indeed, as noted in our main brief, the Magistrate's finding, adopted by the District Court, that Mr. Koegel was not cooperating with counsel was made in the absence of Mr. Koegel, who did not have the opportunity to respond to these charges before the Magistrate and present his side of the issue.

In sum, the fact that several prior hearings were held on totally unrelated issues is no substitute for a hearing

* Although it is a possible reading, we do not understand Mr. Olick's affidavit to state that he informed Mr. Koegel of the existence of the June 21 Order. Although numerous communications to Mr. Koegel concerning prior proceedings are recited, he does not state how or when he informed Mr. Koegel of the Order. It will be recalled that on June 14 counsel had moved to be relieved, and the record is barren of any showing that Mr. Koegel received the order or notice thereof. This is the type of issue that an oral hearing could sharpen.

on the essential and hotly contested issues which must necessarily be determined before the sanction of striking a pleading can be imposed. Not to hold such a hearing is not only a clear abuse of discretion, but it also deprives defendants of their property without due process of law.

Conclusion

The judgment should be vacated and the order denying defendants' motion under Fed. R. Civ. Pro. 60(b) should be reversed.

Respectfully submitted,

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